

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application for Review of Decision of)	CC Docket No. 02-6
The Schools and Libraries Division)	
Of the Universal Service Administrative)	
Company)	
)	
Appeal of Disbursed Funds Recovery Letters)	
Funding Year: 2000-2001)	
Form 471 Application Number: 190697)	
Applicant: Harvey Public Library District)	

**REQUEST FOR REVIEW AND/OR WAIVER BY
SBC ILLINOIS AND AMERITECH ADVANCED DATA SERVICES, INC.**

SBC Illinois and Ameritech Advanced Data Services, Inc. (AADS) hereby appeal the May 10, 2004, Disbursed Funds Recovery Letters from the Universal Service Administrative Company (USAC) to SBC Illinois and AADS. *See* Letter of USAC to Mary Ann Imbrugia, SBC Illinois, attached hereto as Exhibit 1, and Letter of USAC to Mary Ann Imbrugia, AADS attached hereto as Exhibit 2 (collectively “Recovery Letters). In each of those letters, USAC states that it is seeking recovery of funds for telecommunications and Internet access services delivered respectively by SBC Illinois and AADS to the Harvey Public Library District (the “Applicant”) during funding year 2000-2001 on the ground that such funds were disbursed for “services that were delivered prior to the beginning of the funding year.”¹ In both cases, the Applicant sought reimbursement from USAC using the BEAR process, and based its requests on bill dates rather than the dates services were provided. Consequently, it submitted invoices for

¹ *See* Exhibit 1 at 5 (“During the course of an audit, it was determined that \$573.49 was disbursed for services that were delivered prior to the beginning of the funding year.”); and Exhibit 2 at 5 (“During the course of an audit, it was determined that \$5,774.63 was disbursed for services that were delivered prior to the beginning of the funding year.”).

12 months of service beginning with the month prior to the funding year, and did not submit invoices to USAC for the final month of that year.

There is no suggestion that SBC Illinois and AADS are responsible in any way for the Applicant's failure to comply with the e-rate rules, nor is there any claim that SBC Illinois and AADS should have, or even could have, been aware of or prevented the Applicant's erroneous submission of invoices for services delivered prior to the beginning of the funding year.² Yet, under existing procedures, USAC seeks to recover funds erroneously disbursed only from service providers, regardless of whether the service provider was responsible for the disbursement or could have done anything to prevent the error. These procedures are inequitable and inefficient, and undermine service providers' incentives to participate in e-rate projects. For these reasons, SBC Illinois and AADS have urged the Commission to develop new COMAD procedures that focus on the party or parties that are responsible for, or benefited from, e-rate funds, and thus promote accountability and incentives for all parties to comply with e-rate rules.³ In the meantime, where, as here, a service provider already has disbursed e-rate funds to the applicant, and is in not responsible for the erroneous disbursement of funds, the Commission should, to the extent necessary, waive existing procedures, and instruct USAC to seek reimbursement directly from the applicant.

In any event, SBC Illinois and AADS believe that the Commission should waive recovery of the erroneously disbursed funds from the Applicant in this case because it is clear that the Applicant was entitled to, and actually received, reimbursement for 12 months worth of service; it simply submitted invoices for the wrong 12 months of service. In these circumstances, requiring reimbursement would exalt form over substance and needlessly

² As discussed below, when an applicant uses the BEAR process, it is responsible for properly invoicing USAC; the service provider merely certifies that it promptly will remit back to the applicant any reimbursement funds disbursed by USAC. The service provider has no way of knowing whether the applicant has submitted invoices for services provided outside the funding year, or preventing the applicant from doing so.

³ Comments of SBC Communications Inc., CC Docket No. 02-6 (filed Mar. 11, 2004) (SBC Comments).

increase the costs of all concerned by requiring the applicant to repay USAC for reimbursements received for services provided in June 2000 and to resubmit invoices for services provided in June 2001.

I. BACKGROUND

On May 10, 2004, USAC sent SBC Illinois a Disbursed Funds Recovery Letter, notifying SBC Illinois that USAC was seeking recovery of \$573.49 in e-rate funding committed to the Applicant pursuant to FRN 404405 due to non-compliance with the e-rate rules.⁴ USAC's sole explanation for seeking recovery was:

During the course of an audit, it was determined that \$573.49 was disbursed for services that were delivered prior to the beginning of the funding year. According to the rules of the Schools and Libraries Support Mechanism funding can only be provided for services delivered during the appropriate funding year. Accordingly, the SLD must seek recovery of the \$573.49 that was erroneously disbursed.⁵

On the same day, USAC sent ADDS a virtually identical letter, notifying ADDS that USAC was seeking recovery of \$5774.63 in e-rate funding committed to the Applicant pursuant to FRN 404078, again explaining only that:

During the course of an audit, it was determined that \$5, 774.63 was disbursed for services that were delivered prior to the beginning of the funding year. According to the rules of the Schools and Libraries Support Mechanism funding can only be provided for services delivered during the appropriate funding year. Accordingly, the SLD must seek recovery of the \$5,774.63 that was erroneously disbursed.⁶

In both cases, the Applicant sought reimbursement from USAC for telecommunications services and Internet access services provided by SBC Illinois and AADS respectively using the BEAR process. And, SBC Illinois and AADS have learned that, in seeking such reimbursement, the Applicant sought reimbursement on invoices based on the dates the invoices issued rather

⁴ See Exhibit 1 at 5.

⁵ *Id.*

⁶ Exhibit 2 at 5.

than on the dates services were provided.⁷ Consequently, the Applicant submitted invoices for 12 months of service beginning with the month prior to the funding year, and did not submit invoices to USAC for the final month of that year.⁸

II. DISCUSSION

As discussed in more detail below, SBC Illinois and AADS believe that the Commission should waive altogether recovery of the erroneously disbursed funds at issue here. If, nevertheless, the Commission finds that recovery is appropriate, it should direct USAC to seek such recovery directly from the Applicant and, to the extent necessary, waive any procedures that might provide for recovery of such funds from SBC.

In 1999, the Commission first required USAC to adjust commitments for e-rate funding disbursed in violation of the 1996 Act, and directed it to develop a plan for recovering funding improperly or erroneously disbursed.⁹ In a companion order, the Commission waived recovery of funds disbursed or committed in violation of four Commission rules on the ground that affected applicants or service providers may have reasonably relied on the funding commitments by USAC.¹⁰ The following year, the Commission approved USAC's recovery plan, which generally provided for USAC to recover improperly disbursed e-rate funds from service providers, rather than applicants.¹¹ The Commission justified seeking recovery from service providers solely on the ground that "service providers actually receive disbursements of funds

⁷ KPMG Audit No. SL2003BE050, Attachment A at A-6 to A-8, and Management Response Detail at 31 (attached hereto as Exhibit 3).

⁸ *Id.*

⁹ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, FCC 99-291 (rel. Oct. 8, 1999) (*Comad Order*).

¹⁰ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, 15 FCC Rcd 7197, para. 7 (1999) (*Waiver Order*).

¹¹ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, 15 FCC Rcd 22975 (2000) (*Comad Implementation Order*).

from the universal service support mechanism.”¹² But, even then, the Commission acknowledged that these general procedures (*i.e.*, recovering funds from service providers) would not necessarily apply in all cases, “emphasiz[ing]” that these procedures would not apply in cases where the applicant “has engaged in waste, fraud, or abuse.”¹³

Application of the general Disbursed Funds Recovery procedures where, as here, service providers have complied with the e-rate rules exalts form over substance; is inequitable and inefficient; undermines incentives for Applicants to comply with the rules; and would discourage participation in the program. First, the mere fact that service providers, rather than applicants, “actually receive disbursement of funds” is irrelevant. Regardless of whom funds are “actually disbursed” to, it is the applicant, not service providers, to which e-rate funds are committed and which receives the benefits of such funds. Even if funds are disbursed to a service provider, the service provider cannot retain them, but rather must pass them through to the applicant through reimbursements or discounts. Service providers thus are merely conduits for the delivery of funds to the applicant. As such, it is the applicant, not a service provider, that owes a debt to the United States if funds are erroneously disbursed (except where a service provider itself has failed to comply with the e-rate rules). USAC therefore should seek recovery of such funds (either through demand or referral to the Justice Department) directly from the applicant where, as here, such funds were improperly disbursed due to applicant error.

Second, requiring SBC Illinois and AADS to repay USAC for the disbursed funds in this context would be inefficient and patently inequitable. USAC does not assert, nor could it, that SBC Illinois and/or AADS was in any way at fault for the Applicant’s erroneous requests for reimbursement for services delivered prior to the start of the funding year, or that SBC could have done anything to prevent the Applicant’s errors. Indeed, the errors identified are utterly

¹² *Id.* at para. 8. The Commission stated that, in cases of applicant error, it expected service providers to recover from applicants any funds recovered from the service provider by USAC.

¹³ *Id.* at para. 13.

beyond SBC Illinois's and AADS's control, and SBC Illinois and AADS had no way to identify (much less correct or prevent) these errors, nor would it even have learned of these errors had USAC not sent the Disbursed Funds Recovery Letters. In both of these cases, the Applicant sought reimbursement from USAC using the BEAR process. When an applicant uses this process for reimbursement, it is solely responsible for invoicing USAC. The service provider is required only to certify that it promptly will remit back to the applicant any reimbursement funds disbursed by USAC. The service provider does not review the charges the applicant has included on its BEAR form prior to its submission, and has no way of knowing whether the applicant has submitted invoices for services provided outside the funding year, or preventing the applicant from doing so. As a consequence, there was no way that SBC Illinois or AADS could have prevented the erroneous disbursement of funds to the Applicant or taken steps to remedy the Applicant's error.

Requiring SBC Illinois and AADS to repay the erroneously disbursed funds would force them either to try to recover the funds from the Applicant (which likely would be costly and time-consuming, and might be impossible), or absorb the loss. Either way, recovery from SBC Illinois and AADS will increase costs for all concerned, and unfairly punish SBC Illinois and AADS (which reasonably relied on the Applicant's certifications of compliance with e-rate requirements) for the mistakes of the Applicant. And, if SBC Illinois and AADS cannot recover the funds from the Applicant, the Applicant will receive a windfall to which it was not entitled.

Third, seeking reimbursement from SBC Illinois and AADS also would fail to provide proper incentives for the Applicant, and other applicants, to ensure that they have complied fully with e-rate program requirements. As noted above, requiring SBC Illinois and AADS to refund e-rate monies improperly disbursed due to applicant error would force SBC Illinois and AADS to seek recovery from the applicant. But obtaining such recovery from an applicant often has proven difficult because a service provider's only recourse, if an applicant fails to reimburse the provider for such funds, is to threaten to cut off service, which, of course, is unrealistic in light of the public interest implications of such action. Only by seeking refunds directly from applicants,

and denying future e-rate funding if an applicant fails to repay improperly disbursed funds, will the Commission provide appropriate incentives for all program participants to comply with the rules.

Finally, requiring service providers to repay e-rate funds where, as here, the applicant has failed to comply with the e-rate rules will reduce service providers' incentives to bid on e-rate projects, which, in turn, will reduce competition for e-rate contracts. In the end, both consumers and applicants will suffer as e-rate costs increase and e-rate funding (which is capped) fails to be used as productively as it otherwise would.

In any event, under the unique circumstances of this case, the Commission should waive recovery of the erroneously disbursed funds altogether. As noted above, on its BEAR form seeking reimbursement for payments for services provided in FY2000-2001, the Applicant based its reimbursement requests on bill dates rather than the dates services were provided by SBC Illinois and AADS. Consequently, the Applicant submitted invoices for 12 months of service beginning with the month prior to the funding year, and did not submit invoices to USAC for the final month of FY2000-2001. It is clear that the Applicant was entitled to, and actually received, reimbursement for 12 months worth of service; it simply submitted invoices for the wrong 12 months of service. In these circumstances, requiring reimbursement would exalt form over substance and needlessly increase the costs of all concerned by requiring the applicant to repay USAC for reimbursements received for services provided in June 2000 and to resubmit invoices for services provided in June 2001.¹⁴ Because there is no evidence of fraud or other malfeasance, and the Applicant received no more funding than it was entitled to, the Commission should waive recovery altogether.

¹⁴ Or, worse yet, require SBC Illinois and AADS to repay such funds and then seek reimbursement from the Applicant, and require the Applicant to resubmit invoices for services provided in June 2001.

III. CONCLUSION

For the foregoing reasons, the Commission should waive recovery of disbursed funds altogether. But, if the Commission nevertheless deems recovery appropriate in this case, it should (to the extent necessary) waive existing procedures and direct USAC to recover funds directly from the Applicant.

Respectfully submitted,

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